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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-201

Filed: 15 August 2017

Catawba County, Nos. 14 CRS 54897, 54900, 54905, 4711

STATE OF NORTH CAROLINA

v.

LAMAR RASHAD LINEBERGER

Appeal by defendant from judgments entered 2 September 2015 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 7 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Edward Eldred for defendant-appellant.

TYSON, Judge.

Lamar Rashad Lineberger (“Defendant”) appeals from judgments entered upon his convictions for felonious larceny, possession of stolen goods, two counts of misdemeanor larceny, two counts of breaking or entering a motor vehicle, and attaining the status of an habitual felon. We vacate the judgments and remand for resentencing and correction of a clerical error.

STATE V. LINEBERGER

Opinion of the Court

I. Background

On 24 August 2014, Hickory Police Officer Justin Hussey was on patrol duty when he observed a white Toyota Camry vehicle stop for an extended period of time at a stop sign intersection. As Officer Hussey drove past the vehicle, he also observed the driver of the vehicle lean back in his seat and pull his cap down over his eyes. Officer Hussey believed this to be suspicious behavior. He pulled behind the vehicle and began to follow it.

Officer Hussey ran the license plate of the vehicle and determined John Worley was registered as the owner. The driver of the Camry then waved his arm out the window “flagging at [Officer Hussey,]” pulled into a shopping center parking lot, and stopped the vehicle. Officer Hussey activated his blue lights and pulled into the parking lot as the driver stepped out of the vehicle. Officer Hussey identified the driver as Defendant based on his prior interactions with him.

Defendant told Officer Hussey that he was working with another officer in making a controlled drug buy, and allowed Officer Hussey to search him. Officer Hussey found credit cards issued in the name of “John Worley” in Defendant’s pocket. Defendant told Officer Hussey the car belonged to a friend named John, but that he did not know his last name.

The police dispatcher informed Officer Hussey that Defendant’s license was suspended, and additional officers arrived upon the scene to assist with the stop.

STATE V. LINEBERGER

Opinion of the Court

Defendant consented to a search of the vehicle, wherein Officer Hussey found more credit cards issued in the name of “John Worley,” multiple cell phones, a brown wallet with “John Worley’s” driver license inside, and a brown knit purse. Officer Hussey also found credit cards issued in the name of “John Worley” inside of Defendant’s wallet.

Officers contacted Mr. Worley and he was transported to the scene of the stop. Mr. Worley identified the white Camry as his vehicle and some of the items found inside the vehicle as belonging to him. Mr. Worley also stated he did not know Defendant and did not give Defendant permission to use his vehicle.

Mr. Worley’s wife testified that her vehicle, along with Mr. Worley’s Camry that Defendant was found driving, were parked in their driveway the previous night, and that some of the items found in the Camry had been taken from the other vehicle in their driveway.

One of the Worleys’ neighbors testified that her vehicle had been broken into the same night and that the brown knit purse found in the Camry was taken from her vehicle. Defendant was placed under arrest.

On 2 September 2014, a grand jury indicted Defendant on charges of possession of a stolen vehicle, felony larceny, three counts of misdemeanor possession of stolen goods, two counts of misdemeanor larceny, two counts of breaking or entering a motor vehicle, and attaining the status of an habitual felon.

STATE V. LINEBERGER

Opinion of the Court

When his case came on for trial on 31 August 2015, Defendant waived his right to a jury trial pursuant to N.C. Gen. Stat. § 15A-1201. Defendant testified a man named “John” had let him use the vehicle for a twelve-hour period in exchange for \$40.00, and Defendant did not know the vehicle was stolen.

The trial court found Defendant guilty of felony larceny, felony possession of a motor vehicle, two counts of misdemeanor larceny, two counts of possession of stolen goods, and two counts of breaking or entering a motor vehicle. The court also determined Defendant had attained the status of being an habitual felon. Defendant stipulated to his prior record level worksheet showing him to be a prior record level V offender with fourteen prior record level points.

The trial court consolidated the convictions into two judgments and sentenced Defendant to consecutive sentences of 111 to 146 months and 44 to 65 months of imprisonment. Defendant did not file notice of appeal. On 22 July 2016, Defendant filed a petition for writ of certiorari seeking a belated appeal of his judgments, which this Court allowed by order entered 5 August 2016.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) calculating his prior record level by using two felony convictions from a single superior court session in the same week; and (2) entering judgment on the breaking or entering a motor vehicle convictions, which contains a clerical error that Defendant was a habitual breaking and entering status offender.

IV. Prior Record Level Determination

Defendant contends, and the State concedes, that the trial court erred by sentencing him as a prior record level V offender. Defendant was assigned four additional points when the State used two Class G felony convictions from the same court week in calculating his prior record level. We agree.

Although a defendant may stipulate to “the existence of [his or her] prior convictions, which may be used to determine the defendant’s prior record level for sentencing purposes, the trial court’s assignment of defendant’s prior record level is a question of law.” *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830-31 (2013) (quoting *State v. Wingate*, 213 N.C. App. 419, 420, 713 S.E.2d 188, 189 (2011)). “Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.” *Id.* at 167, 736 S.E.2d at 831 (internal quotation marks omitted). Therefore, “[w]e review the calculation of [defendant’s] prior record level [as] a conclusion of law that is subject to *de novo* review on appeal.” *State v. Mungo*, 213 N.C. App. 400, 404, 713 S.E.2d 542, 545 (2011)

STATE V. LINEBERGER

Opinion of the Court

(quoting *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010)).

“In felony sentencing, an offender’s prior record level ‘is determined by calculating the sum of the points assigned to each of the offender’s prior convictions” *State v. Eury*, ___ N.C. App. ___, ___, 781 S.E.2d 869, 870-71 (2016) (quoting N.C. Gen. Stat. § 15A-1340.14(a) (2013)). For each prior Class 1 non-traffic misdemeanor offense, an offender is assigned one point. N.C. Gen. Stat. § 15A-1340.14(b)(5) (2015). For each prior Class G felony, an offender is assigned four points. N.C. Gen. Stat. §15A-1340.14(b)(3) (2015).

However, “if an offender is convicted of more than one offense in a single superior court [session] during one calendar week, only the conviction for the offense with the highest point total is used.” N.C. Gen. Stat. § 15A-1340.14(d) (2015).

Here, the trial court concluded Defendant’s prior record level to be a level V for felony sentencing purposes, based upon a finding of fourteen prior sentencing points. The trial court assigned Defendant six points for six prior Class 1 non-traffic misdemeanors and eight points for two prior Class G felonies.

However, because the Class G felony convictions are from the same superior court session during one calendar week, the trial court was only authorized to use one of the Class G felony convictions to calculate Defendant’s prior record level. By including four additional prior record level points, the trial court erred. Defendant

STATE V. LINEBERGER

Opinion of the Court

should have been sentenced as a prior record level IV offender with ten prior record level points. The trial court's sentences are vacated and we remand for resentencing based on the proper prior record level.

V. Clerical Error

Defendant also contends, and the State concedes, that the trial court made a clerical error in the judgment for file number 14 CRS 54900 by checking the box adjudging Defendant "to be a habitual breaking and entering status offender, to be sentenced as a Class E felon[,]" rather than the box adjudging him to be an habitual felon.

Defendant was not indicted for attaining the status of a habitual breaking and entering offender. Nevertheless, "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008). We remand for the trial court to correct the aforementioned clerical error in the judgment for file number 14 CRS 54900.

VI. Conclusion

The trial court erred by determining Defendant is a prior record level V offender when the court calculated Defendant's prior record level by considering two Class G felony convictions from the same superior court session during one calendar

STATE V. LINEBERGER

Opinion of the Court

week. We remand for resentencing on the appropriate prior record level, and to correct the clerical error on the judgment for file number 14 CRS 54900. *It is so ordered.*

REVERSED AND REMANDED.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).